UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

No. 04-0509-CV
Feb. 23, 2005

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

ELAINE L. CHAO,

Plaintiff-Appellee,

v.

HAROLD LEVINSON ASSOCIATES, INC., A Corporation, and EDWARD BERRO, Individually and as President,

Defendant-Appellants.

ROBERT E. GOLDMAN, New York, N.Y. (Andrew M. Lankler, Idelle R. Abrams, Lankler & Carragher, LLP, New York, NY, *on the brief*), for Appellant.

JOAN BRENNER, Attorney, United States Department of Labor, Office of the Solicitor, Washington, DC (Howard M. Radzely, Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, *on the brief*), for Appellee.

PRESENT: SOTOMAYOR, KATZMANN, *Circuit Judges*, and CEDARBAUM,* *District Judge*.

SUMMARY ORDER

Defendant-appellants Harold Levinson Associates and Edward Bello appeal from a December 31, 2003 judgment entered in the United States District Court for the Eastern District of New York (Charles R. Wolle, J., sitting by designation). We assume the parties' familiarity with the facts and procedural history of this case. On this appeal, defendant-appellants Harold Levinson Associates and Edward Bello raise two issues previously decided by the district court and this Court. *See Harold Levinson Assocs., Inc. v. Chao*, 37 Fed. Appx. 19 (2d Cir. 2002); *Herman v. Harold Levinson Assocs., Inc.*, No. CV-95-1721, 2001 WL 34088698 (E.D.N.Y. Apr. 20, 2001). They argue (1) that they are

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* Hon. Miriam Goldman Cedarbaum, United States District Judge for the Southern District of New York, sitting by designation.

entitled to a credit of $529,000 against their liability under Section 7(h) of the Fair Labor Standards Act, 29 U.S.C. § 207(h), and (2) that the formula for computation of damages specified by this Court on remand does not yield a just and reasonable approximation of overtime hours worked because it fails to take into account the growth of defendants' business over time. We note that the district court was correct that these issues were decided against defendants in this Court's prior order and were outside the scope of our order on remand. We do not reach plaintiff's argument that the doctrine of the law of the case bars reconsideration of these issues, however. The district court in its discretion received new evidence and argument, and we agree with its determination that defendants' arguments are wholly without merit. *See Furlong v. Shalala*, 238 F.3d 227, 235 n. 4 (2d Cir. 2001) (noting that doctrine of law of the case is purely discretionary); *DiLaura v. Power Auth.*, 982 F.2d 73, 76 (2d Cir. 1992) (noting that the doctrine is not a limit on a court's power to reconsider its decisions).

Defendants fail to establish that the $529,000 in question was paid for any of the purposes specified at 29 U.S.C. § 207(h)(2), and thus their claim that this Court's prior denial of a § 207(h) credit was error is baseless.[1] *See Harold Levinson Assocs., Inc.*, 37 Fed.Appx. at 20 (reject-

[1] *Compare* 29 U.S.C. § 207(h)(2) (providing, via cross-reference to 29 U.S.C. § 207(e)(5), that credit is available for, *inter alia*, "compensation provided by a premium rate for certain hours worked by the employee" in excess of the maximum applicable workweek) *with* Defs.' Br. at 18 (arguing that pretrial stipulations bind this Court to find that the funds in question were premium "pay for which no overtime was worked"). Defendants fail to point to any evidence suggesting that § 207(e)(5), (6) or (7), as incorporated in § 207(h)(2), are applicable.

ing claim to offset because "this case does not involve payments that satisfy the requirements of [§ 207(h)]"). As to the calculation of damages, the district court correctly found that the evidence adduced by defendants at the second trial did not call into question the reasonableness of the formula this Court previously settled on to determine overtime hours worked between May of 1992 and October of 1993. *See id.* at 22. Defendants' evidence consisted of a damages calculation which assumed, quite implausibly, that overtime person-hours grew in direct proportion to gross sales measured in dollars or sales measured by the number of cigarette cartons shipped (defendants do not bother to specify which). There was no evidence to support the crucial assumption that HLA took no steps to increase productivity as its business grew; indeed, as the district court correctly found, there was no direct evidence at all concerning the impact of this growth on HLA's personnel to rebut the credible testimony of employees at the first trial that their hours remained relatively constant during the relevant period. *See id.* The calculations did not include even the rudimentary step of controlling for change in the number of employees over time, which would certainly affect the number of overtime hours worked. This Court's instructions in its prior order yield a reasonable estimate of damages, and the district court did not err in rejecting defendants' unreasonable and belatedly proffered alternative. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); *Reich v. Southern New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir.1997). Defendants assign no other error to the calculation the district court performed pursuant to our instructions.

For these reasons, we affirm the judgment of the district court in all respects.

121 Fed.Appx. 918, 2005 WL 428787 (2nd Cir.(N.Y.))

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NO. 95 cv 1721 (CRW)
December 30, 2003

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,

Plaintiff,

—against—

HAROLD LEVINSON ASSOCIATES, INC., A Corporation, and
EDWARD BERRO, Individually and as President,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT FOR PLAINTIFF ON REMAND

On August 4, 2003, the undersigned visiting Senior United States District Judge (presiding in this case upon intercircuit assignment) concluded a bench trial on remand, then set a briefing schedule requiring final briefs and proposed decisions to be filed by September 2, 2003. With the case now ready for ruling, the court files this remand decision containing findings of fact, conclusions of law, and directions for entry of final judgment. The clerk of court shall enter judgment for plaintiff and against defendants in the amount of $831,147.18 for actual damages and liquidated damages allocated to the underpaid employees as set forth in plaintiff's exhibits 1 and 2 received in evidence at trial. Plaintiff is also entitled to the costs of this action.

Background. In September of 2000, the court held a bench trial and thereafter filed Findings of Fact, Conclusions of Law, and a Judgment for plaintiff (the "earlier judgment"), awarding plaintiff total damages of $991,669.16, for distribution to employees and former employees of the defendants.

Following appeal, the United States Court of Appeals for the Second Circuit in an unpublished "summary order" dated May 22, 2002, affirmed in part and vacated and remanded in part. Following remand, the undersigned Senior United States District Judge first held a hearing on plaintiff's motion for recusal, then denied the motion. A one-day bench trial followed several months later.

With the record now complete, and final briefs submitted, the court enters this remand decision that rules on reserved evidentiary questions and decides the issue remanded by the Court of Appeals. The court also addresses and decides questions the defendants believe the Court of Appeals left open.

The parties disagree about what issues the Court of Appeals remanded. Plaintiff contends this court's only task is to recalculate the damages awarded to all but three employees, and to recalculate for only one of the two relevant time periods, the so-called PCX period from May of 1992 to October of 1993 which preceded defendants' installation of a time clock. Defendants, in contrast, read the Court of Appeals decision much differently, arguing that the court should consider their proffered new expert opinion testimony, then conclude that defendants may credit excess overtime payments made during the so-called ADP period against underpayments of overtime pay during the earlier PCX period.

The plaintiff proffers the only sound reading of the court of appeals decision. At page three of the Summary Order, that court wrote:

> "We are unable, however, to accept the importation of the average weekly hours worked for the ADP period as the assumed number of hours worked for each given week during the PCX period. The time-clock records demonstrate that hours tended to fluctuate from one week to the next. Given this reality and given that many of the derived PCX hours are based on departmental rather than individual averages, we find that actual hours worked by each individual employee for each specific PCX week cannot be derived as a matter of reasonable inference. Because damages are awarded for weeks during which the derived hours exceeded the payroll record hours, but not offset by weeks during which the payroll records exceed the derived hours, assuming that in each week of the PCX period each employee worked precisely the average number of hours worked unfairly penalizes the defendants. *We therefore remand for computation of damages (for all employees other than Steven Hladek, Sylvia Capizzi, and Edward Krulish, with respect to whom we affirm the damage amounts for both the ADP period and the PCX period) based on comparison of the total hours worked by each employee for the entire PCX period (computed by multiplying the imported ADP weekly average by total PCX period weeks worked) against total hours compensated for the PCX period.* We leave to the District Court's discretion the issue of what pay rate should be used for computing PCX period damages where an

> employee's pay rate changed during the PCX period." [Emphasis supplied.]

The court of appeals affirmed in explicit language all other aspects of the court's findings, conclusions, and the earlier judgment that defendants had appealed. And the Summary Order concluded with this final paragraph a; page 7,

> Thus, the sole issue for resolution on remand is calculation of damages for the PCX period for employees other than Steven Hladek, Sylvia Capizzi, and Edward Krulish. In all other respects, we affirm the judgment of the District Court. The judgment of the District Court is AFFIRMED in part, and VACATED AND REMANDED in part.

Remanded Damage Recalculation. During trial on remand, the court received in evidence the entire record of the first bench trial, supplemented by exhibits proffered by the plaintiff and testimony and exhibits proffered by defendants. Plaintiff's exhibits included remand exhibits 1 through 6 that accurately set forth the mathematical calculations called for by the above-quoted portions of the court of appeals decision. Defendants have not presented any credible challenge to those calculations. The plaintiff's exhibits and underlying payroll data from defendants' records support the unpaid overtime pay damages and liquidated damages for the PCX period calculated as directed by the court of appeals: comparison of the total hours worked by each employee for the entire PCX period (computed by multiplying the ADP weekly average by total PCX period weeks worked) against total hours compensated for the PCX period.

No recalculation is required for the ADP period when defendants provided a time clock, nor for the employees Hladek, Capizzi, and Krulish for either the PCX period or ADP period. The court of appeals affirmed calculation of damages sustained by those three employees in the second-to-last paragraph of its decision.

The Previous Bench Decision Revisited. Before concluding this remand decision and judgment, the court reviewed the entire record, its earlier judgment, and its detailed findings and conclusions. The court now holds there is no evidentiary basis for the several contentions urged by defendants following remand.

Cases cited by defendant suggest a district court on remand may in unusual circumstances reopen issues not explicitly decided by a court of appeals. *See U.S. v. Cerami*, 563 F.2d 26, 33 (2d Cir. 1977) (exceptional circumstances permit defendant to raise new issues before trial court in second Rule 60(b)(6) proceeding); *c.f. U.S. v. Uccio*, 940 F.2d 7533, 758 (2d Cir. 1991) (dictum) (court of appeals addresses reopened issues but adheres to its previous decision). *Contra U.S. v. Fernandez*, 506 F.2d 1200, 1202 (2d Cir. 1974) (quoting J. Moore, Federal Practice, ¶0.-404[10], at 571 (2d ed. 1974)):

> Where a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court.

Munro v. Post, 102 F.2d 686, 688 (2d Cir. 1939) (district court has duty to follow ruling made by court of appeals in earlier stage of case).

Recognizing that the court of appeals, in a second view of this case, may be persuaded that this is an exceptional case requiring the district court to reopen all issues, this court during the remand trial permitted defendants to present all their evidence and arguments, making a plenary trial record. Rulings were reserved on plaintiff's objections to admissibility of defendants' expert witness testimony and exhibits.

Rulings on plaintiff's objections. For the purpose of the expanded review this court has undertaken, the court now overrules plaintiff's objections to the foundation for defendants' new evidence. The court receives that challenged evidence in order that the court may determine whether all evidence supports its previous judgment and its findings of fact and conclusions of law entered after the first trial. So the defendants' new evidence is received and considered. The court finds, however, that the expert testimony is entitled to little weight.

The expert witnesses had no more data to review than the plaintiff used in its recalculation based on the new formula prescribed by the court of appeals. The expert witnesses did not use the above-quoted formula to calculate PCX period backpay damages. Their attempt to credit alleged PCX overpayments against ADP unpaid overtime violates the law precluding such adjustments in the absence of a valid prepayment plan that would comply with 29 U.S.C. section 207(f), such as a so-called Belo plan. The experts' attempt to use growth in sales and product carton volume to reduce PCX period weekly hours was entirely unpersuasive. Defendants failed to establish a correlation between hours warehouse and driver employees worked, compared to the sales and product volume they produced. The court reasonably infers that employees performing assembly, loading, and

delivery tasks may well be able to handle much greater volume without an increase in their hours at work or the number of employees performing the tasks. In addition, the experts incorrectly understood the issues of law decided by the court of appeals; they assumed payments of alleged excess overtime and holiday pay in the PDX time period could be offset against ADP period underpayments.

It is noteworthy that the witness Andrew De Francesco, defendants' present CFO, and a CPA, had no personal knowledge of defendants' operations in the PCX period before he held that position with defendants, so his opinions about business operations during PCX period are suspect. The court gives little weight to the testing of defendants' witness CPA, Alan A. Schachter, because he relied on the De Francesco testimony and had little understanding of the law governing required prepayment plans. And the other expert witnesses Cort and Klebbersmith relied on flawed analyses of data concerning comparative sales volume, carton count, and number of employees performing work in the PCX and ACP periods to support defendants' claim of overpayments credits from the later to the earlier PCX period. Defendants' new evidence presented during the remand trial was not persuasive.

Findings of fact. Because defendant failed to keep accurate records of hours worked and willfully failed to compensate for overtime hours in both the PCX period and ACP period, the court finds entirely inadequate their present efforts to reconstruct hours employees worked in the PCX period, and their claims of basic unfairness of the previous judgment finding that the plaintiff had proved defendants liable for underpayments and liquidated damages.

With its present review of the plenary remand record now complete, the court reaches the same findings of fact and conclusions of law that were contained in its previous judgment, except for the PDX period damages that are here recalculated based on the plaintiff's evidence.

Conclusions of law. This court's conclusions of law are those set forth in the previous judgment, as affirmed by the court of appeals in all respects except for the method of calculating PCX damages for all but three employees.

Judgment on remand. The clerk of court shall enter judgment for plaintiff, requiring defendants Harold Levinson Associates, Inc. and Edward Berro to pay to plaintiff the sum of $423,823.59 in unpaid overtime wage compensation and $407,323.59 in liquidated damages, for a total of $831,147.18, as set forth in the plaintiff's exhibits reflecting the plaintiff's recalculation of PCX damages, added to the damages affirmed by the court of appeals.

The defendants are ordered to pay this total amount to the plaintiff on or before January 28, 2004, by delivering to plaintiff a certified check for $831,147.18 payable to the U.S. Department of Labor, Wage and Hour Division, c/o Bank of America, P.O. Box 845229, Dallas, Texas 75283-5229. Simultaneously with the delivery of the original check, defendants shall mail copies of the check and transmittal letter to plaintiff's counsel of record.

Neither defendants nor anyone on their behalf shall directly or indirectly solicit or accept the return or refusal of any sums paid under this judgment. Plaintiff shall distribute the defendants' payments to the employees involved, or to their estates if that is necessary; any sums not distributed to the employees named herein, or to their personal representatives because of inability to locate the proper persons or

because of such persons' refusal to accept such sums, shall be deposited with the Clerk of this Court, who shall deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. § 2041-2042.

Plaintiff is awarded costs of this action from May 2, 1995. This judgment shall be joint and several against the two defendants.

SO ORDERED.

Dated this 30th day of December, 2003.

/s/ CHARLES R. WOLLE

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT
Sitting by designation in the
Eastern District of New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

Docket No. 01-6105
May 22, 2002

United States Secretary of Labor brought enforcement action against employer alleging violation of Fair Labor Standards Act (FLSA) overtime provisions. Following bench trial, the United States District Court for the Eastern District of New York, Wolle, J., entered judgment against employer and awarded back-pay damages of just under $1 million. Employer appealed. The Court of Appeals held that: (1) testimony by former employees sustained judgment, but (2) District Court made improper assumption regarding average weekly hours worked after employer's acquisition of time clock.

Affirmed in part and vacated and remanded in part.

HAROLD LEVINSON ASSOCIATES, INC., a Corporation, and EDWARD BERRO, Individually and as President,

Defendants-Appellants,

v.

ELAINE L. CHAO, Secretary of Labor, United States Dep't of Labor,

Plaintiff-Appellee.

Appeal from the United States District Court for the Eastern District of New York (Wolle, J.).[1]

Robert E. Goldman, Esq., Goldman & Weintraub, New York, NY, for Defendants-Appellants.

Joan Brenner, Esq. (Eugene Scalia, Steven J. Mandel, Paul L. Frieden, on brief), U.S. Dept. of Labor, Office of the Solicitor, Washington, DC, for Plaintiff-Appellee.

PRESENT: OAKES, KATZMANN, *Circuit Judges*, and J. GARVAN MURTHA,[2] *District Judge*.

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[1] The Honorable Charles R. Wolle of the United States District Court for the Southern District of Iowa, sitting by designation.

[2] The Honorable J. Garvan Murtha of the United States District Court for the District of Vermont, sitting by designation.

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED in part, and VACATED AND REMANDED in part.

The defendants appeal the decision of the District Court following a bench trial finding the defendants liable for a failure properly to pay overtime compensation as required by 29 U.S.C. § 207(a), and awarding total damages of $991,669.16 to plaintiff for distribution to employees and to former employees of the defendants. For the reasons that follow, we affirm the District Court's finding of liability, but remand for partial recalculation of damages.

We review a district court's bench trial findings of fact for clear error and its conclusions of law *de novo*. *LeBlanc v. Cleveland,* 198 F.3d 353, 356 (2d Cir. 1999). Factual findings "will not be set aside unless they are without adequate support in the record, are against the clear weight of the evidence, or are the product of an erroneous view of the law." *Ezekwo v. New York City Health & Hosps. Corp.,* 940 F.2d 775, 780 (2d Cir. 1991).

The District Court's finding that the defendants had failed properly to record overtime hours and pay proper compensation for such hours is not clearly erroneous. Several former employees, all of whom the District Court found "credible," testified that they in many weeks worked more hours than they were paid for, and that the defendants' time records did not properly reflect hours worked. The defense offered no witnesses to rebut the testimony of the employees who testified for the plaintiff. The District Court's findings about various irregularities within the defendants' payroll system—that employees received steady pay regardless of hours worked even though no prepayment plan was in effect, that no pay

stubs were provided during part of the period in question, and that even after pay stubs were distributed, such pay stubs did not indicate hours worked—were also based on ample evidence and are not clearly erroneous.

A plaintiff need not compute FLSA damages with precision. The burden is on an employer properly to record hours, and an employee need only as a *prima facie* matter present an estimate of damages that is satisfactory as "a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). It then falls upon the employer to rebut the employee's prima facie case by providing "evidence of the 'precise amount of work performed' or evidence to 'negative the reasonableness of the inference to be drawn from the employee's evidence,' [and if the employer fails to do so] the court may then 'award damages to the employee[s], even though the result be only approximate.'" *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58, 67 (2d Cir. 1997) (quoting *Mt. Clemens*, 328 U.S. at 687-88). In this case, the District Court reasonably chose to discredit the attempts by the employer to utilize its own records to prove hours worked. Thus, the plaintiff needs merely to offer an estimate of damages that is satisfactory as a matter of reasonable inference.

This burden is not high, and a "representative sample" of employees can provide a foundation for assumptions about the overall employee pool, as long as a representative from each relevant category of employees testifies. *See Southern New England Telecommunications Corp.*, 121 F.3d at 66-67 (internal citations omitted) ("it is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA. The Secretary's burden in such cases, while not overly onerous, is to establish a prima facie case.").

The parties stipulated that calculation of hours for the period during which a time-clock was in place (the "ADP period") would be based on such time-clock. The plaintiff used the wage rates found in the defendants' payroll records in order to calculate the damages. We find this calculation method clearly reasonable, and also find reasonable the decisions of the plaintiff with respect to estimating weekly hours for the three salaried employees and the employees who were paid bi-weekly. We therefore affirm the District Court's award of $91,758.50 for the ADP period.

The PCX period calculations present more difficult issues. As a general matter, we find reasonable the plaintiff's attempt to use the data derived from the time-clock as a basis for reconstructing the hours worked during the period (the "PCX period") preceding the installation of the time-clock. Representatives of each relevant employee category testified that hours worked had remained steady throughout the PCX and ADP periods, and the District Court specifically found that employees generally worked similar hours during these two periods. The defendants object to the importation of ADP records by asserting that the company grew by 25% from the PCX period to the ADP period, and that the ADP interval contained two holiday seasons (rather than the one found during the PCX period), which were especially busy. For these reasons, the defendants argue that importing the ADP figures into the PCX period overstates the Paychex hours. This argument is not without some force. However, it was the defendants' responsibility accurately to record hours. In the absence of credible recordkeeping by the defendants, and given the testimony that hours remained stable across the two periods, we find that reference to the ADP figures provides a reasonable method of calculating PCX period damages.

We are unable, however, to accept the importation of the average weekly hours worked for the ADP period as the

assumed number of hours worked for each given week during the PCX period. The time-clock records demonstrate that hours tended to fluctuate from one week to the next. Given this reality and given that many of the derived PCX hours are based on departmental rather than individual averages, we find that actual hours worked by each individual employee for each specific PCX week cannot be derived as a matter of reasonable inference. Because damages are awarded for weeks during which the derived hours exceeded the payroll record hours, but not offset by weeks during which the payroll records exceed the derived hours, assuming that in each week of the PCX period each employee worked precisely the *average* number of hours worked unfairly penalizes the defendants. We therefore remand for computation of damages (for all employees other than Steven Hladek, Sylvia Capizzi, and Edward Krulish, with respect to whom we affirm the damage amounts for both the ADP period and the PCX period) based on comparison of the total hours worked by each employee for the entire PCX period (computed by multiplying the imported ADP weekly average by total PCX period weeks worked) against total hours compensated for the PCX period. We leave to the District Court's discretion the issue of what pay rate should be used for computing PCX period damages where an employee's pay rate changed during the PCX period.

We reject the defendants' argument that their purported "overpayments" of overtime in certain weeks should offset their liability for other weeks. The District Court found (correctly, in our view) that the defendants did not have a valid prepayment plan complying with 29 U.S.C. § 207(f) or with the guidance set forth in Wage and Hour Division Interpretive Bulletin No. 4, ¶¶ 53-67. While there is a difference of authority with respect to whether premium pay which is creditable pursuant to 29 U.S.C. § 207(h) may be credited across pay periods, *compare Howard v. City of Springfield,* 274 F.3d

1141, 1149 (7th Cir. 2001) ("Because the statute contemplates that overtime will be paid and calculated on a pay period basis, it is consistent with that language to calculate and apply credits in the same manner") with *Abbey v. City of Jackson,* 883 F.Supp. 181, 186-87 (E.D. Mich. 1995) (not allowing a credit across pay periods would result in a "windfall and the purposes and goals of the statute would not be served"), this case does not involve payments that satisfy the requirements of that provision. The purported "overpayments" are largely based on nothing more than assumptions that were stipulated for trial, and provide no basis for a credit.[3]

We also agree with the District Court that the defendants' violations were "willful" within the meaning of 29 U.S.C. § 255(a), and that the defendants do not satisfy the good faith reasonable belief exception to liquidated damages provided by 29 U.S.C. § 260. A FLSA violation is willful when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Herman v. RSR Security Services Ltd.,* 172 F.3d 132, 141 (2d Cir. 1999) (quoting *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988)). "The employer bears the burden of proving good faith and reasonableness, but the burden is a difficult one, with double damages being the norm and single damages the exception. To establish good faith, the employer must take

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[3] Our decision in this regard is not inconsistent with our decision to remand. Our decision to remand effectively gives the defendants the benefit of a credit for the PCX period, but does so not because as a matter of law the defendants are entitled to credit one week's overpayment against another week's liability, but because of the lack of foundation for the plaintiff's actual computations of weekly hours for the PCX period. For the ADP period (where the estimated hours are based directly on the time-clock), we decline to award any credits or to order a comparison of aggregate figures for the entire period.

active steps to ascertain the dictates of the FLSA and then act to comply with them." *RSR Security Services,* 172 F.3d at 141-42. The defendants' attempt to subvert an earlier settlement with the plaintiff, and the defendants' utter failure to implement proper recordkeeping even after the investigation giving rise to such settlement, support the finding that the defendants' violations were willful and not rooted in a good faith reasonable belief that its practices complied with FLSA.

Finally, we affirm the District Court's holding that employees Steven Hladek, Sylvia Capizzi, and Edward Krulish were not exempt from the overtime requirements of the FLSA. All three employees performed some managerial functions, but lacked the discretionary role in the organization required to satisfy the "bona fide executive, administrative, or professional capacity" exception provided in 29 U.S.C. § 213(a)(1). It appears that the District Court declined to award liquidated damages to Edward Krulish, presumably because of the closeness of the exemption issue. We affirm this decision.

Thus, the sole issue for resolution on remand is calculation of damages for the PCX period for employees other than Steven Hladek, Sylvia Capizzi, and Edward Krulish. In all other respects, we affirm the judgment of the District Court. The judgment of the District Court is AFFIRMED in part, and VACATED and REMANDED in part.

37 Fed.Appx. 19, 2002 WL 1032708 (2nd Cir.(N.Y.))

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. Civ. A. CV-95-1721.
April 20, 2001

ALEXIS M. HERMAN, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

HAROLD LEVINSON ASSOCIATES, INC., A Corporation, and
EDWARD BERRO, Individually and as President,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT FOR PLAINTIFF

WOLLE, J.

The undersigned United States District Judge, sitting by intercircuit assignment, was assigned this case for final pretrial proceedings and a bench trial. The trial was held on several days in August and September of 2000, with submission following closing arguments on September 27, 2000, and a schedule of final written proposed decisions and briefs, the last brief filed on November 9.[1]

[1] I regret that five months have elapsed between filing of the last briefs and filing of this decision. I have had to read, compare, and analyze a large number of exhibits and testimony of many witnesses, including expert witnesses. I have had difficulty comparing some witnesses testimony with the records of the defendant company. The company records did not accurately capture the time employees actually worked during most pay periods at issue in this lawsuit.

Plaintiff has proved all of its claims; defendants have not proved any defense to the claims. The clerk of court shall enter judgment in favor of plaintiff and against defendants for actual damages, liquidated damages, and costs of this action, in accordance with the following findings and conclusions.

FINDINGS OF FACT

For a better understanding of this court's findings on disputed questions of fact, the court precedes its fact-findings with the parties' stipulated facts contained within the pretrial order approved by U.S. Magistrate Judge Viktor V. Pohorelsky on June 28, 1999.

1. Defendant Harold Levinson Associates, Inc. is, and at all times hereinafter mentioned, was a corporation duly organized under the laws of the State of New York having its principal office and place of business at 100 Commercial Street, Plainview, New York, during the first portion of the investigation period. Subsequently the defendant moved to One Enterprise Place, Hicksville, New York 11801, where it is still doing business. Both places of business are within the jurisdiction of this court and defendant continues to be engaged in the business of wholesale distribution of candy, cigarettes, tobacco, and related activities.

2. Defendant corporation, at all times material to this action, regulated the employment of all persons employed by said corporation, acted directly and indirectly in the corporation's interest in relation to said employees, and was thus an employer of said employees within the meaning of section 3(d) of the Act.

3. Defendant Edward Berro, who resides at 9 Roseann Drive, Woodbury, New York 11797, and who has maintained a place of business at One Enterprise Street, Hicksville, New York 11801 is, and at all times hereinafter mentioned was, President of the aforesaid corporation, in active control and management of said defendant corporation, and was thus an employer of said employees within the meaning of section 3(d) of the Act.

4. The business activities of the defendants, as described herein, are related and performed through unified operation or common control for a common business purpose and constitute an enterprise within the meaning of section 3(r) of the Act.

5. At all times hereinafter mentioned, defendants have employed and are employing employees in and about their place of business in the activities of said enterprise engaged in commerce, or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce. Said enterprise, at all times hereinafter mentioned, has had an annual gross volume of sales made or business done in an amount not less than $500,000.00. Therefore, the said employees are employed in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of section (3)(s)(1)(A) of the Act.

6. Defendants admit that plaintiff's transcriptions of the defendants' payroll records, as reflected in the "Levinson Back Wage Computations—Detail Report" prepared by William Devins and produced to defendants on or about December 9, 1997, accurately reflect the names of defendants' employees, with some exceptions.

7. Defendants admit that plaintiff's transcriptions of the defendants' payroll records, as reflected in the "Levinson Back Wage Computations—Detail Report" prepared by William Devins and produced to defendants on or about December 9, 1997, accurately reflect the pay period end dates of the employees during their employment, except for certain listed exceptions as reflected in Defendants' Responses to Plaintiff's Request to Admit, attached.

8. Defendants admit that plaintiff's transcriptions of the defendants' payroll records, as reflected in the "Levinson Back Wage Computations—Detail Report" prepared by William Devins and produced to defendants on or about December 9, 1997, accurately reflect the gross wages paid, except for certain listed exceptions as reflected in Defendants' Responses to Plaintiff's Request to Admit, attached.

9. Defendants admit that plaintiff's transcriptions of the defendants' payroll records, as reflected in the "Levinson Back Wage Computations—Detail Report" prepared by William Devins and produced to defendants on or about December 9, 1997, accurately reflect the "punch detail report hours" for the time periods stated as reflected in Defendants' Responses to Plaintiff's Request to Admit, attached.

10. The plaintiff's transcriptions of the defendants' payroll records, as reflected in the reports produced to defendants on February 12, 1999, accurately reflect the following data:

(a) the names and social security numbers of defendants' employees;

(b) the pay period end dates during their employment;

(c) the gross wages actually paid;

(d) the "punch detail report hours", for the time periods stated;

(e) the hourly rates paid to employees.

11. The plaintiff's computations of back wages due accurately reflect the identities of defendants' employees, their periods of employment, their wages paid, and during the ADP period their weekly hours actually worked.

12. The wages computed by plaintiff as due each week in the ADP PERIOD REPORT for weeks in which overtime hours were worked were obtained by multiplying each employee's regular rate times 40, plus time and one-half that regular rate for each hour worked over 40 each week as reflected on the "punch detail report hours" for each employee, each week.

13. The collective bargaining agreement in force at defendants' company from May, 1992 through December, 1994 required all hourly employees to be paid time and one-half for all hours worked in excess of 40 in a workweek.

[In addition to these thirteen paragraphs of stipulated facts, the court finds the following facts established by a preponderance of the evidence in this record.]

14. This case concerns defendants' payment of employees during the payroll periods from (1) May of 1992 to October of 1993 (hereafter "Paychex") when the Paychex payroll company prepared payment records, and (2) October 1993 to December 1994 when the ADP payroll company prepared pay records. In October 1993, defendants installed a computerized time clock that produced records of hours worked thereafter.

15. Beginning in 1990, an FLSA investigator determined that defendants had been violating the record-keeping and overtime requirements of federal law by failing to record and maintain actual hours employees worked and by failing to pay premium pay for hours worked in excess of 40 each week. Defendants agreed with the FLSA investigator to make full restitution of $79,436 to 43 employees adversely affected by the violations. The next year defendants provided the investigator signed statements from the employees whom defendants purported to pay the amounts defendants had agreed to pay. But defendant Berro and the defendant company's representatives, working at Berro's direction, used threats of adverse employment action to persuade most employees to sign the checks and receipts, then return to the defendant company the money paid to them in restitution. Defendants' conduct in forcing employees to return the moneys owed them for violations of federal law persuasively proves that defendants have not only ignored FLSA requirements then and more recently but have intentionally flaunted FLSA principles of law. Subsequent actions by defendants in the pay periods here in question confirm that Berro and the defendant company have continually, willfully evaded and violated known requirements of the FLSA.

16. The many employees that plaintiff presented to testify at trial provided credible testimony, without exception. The court finds the employees' testimony consistent with the plaintiff's contention that in the time periods May 1992 through October 1993 and October 1993 to December 1994, defendants made no sincere effort to have records accurately reflect the lengthy hours that employees really worked. Even when the time clock was installed in October 1993, the time clock included a generic program to

deduct a lunch break that many employees did not take. From May 1992 to October 1993, the payrolls were prepared based on general schedules of hours for each employee, and the employees almost always worked more time than shown on the schedules. And the schedules did not accurately reflect the employees' time working at the facility or on the road.

17. Throughout the period October 1993 to December 1994, the company did not accurately pay for hours actually worked. Hours on the ADP payroll were created not from time actually worked but from schedules prepared to have the gross pay defendants determined an employee should earn match the salaries sent to ADP.

18. Throughout both time periods, employees routinely worked Saturdays, were paid cash for their work, and worked longer hours than shown on defendants' records.

19. Throughout the time periods in question, employees were hired by defendant Berro or his designees, with a net take-home salary negotiated. They did not advise employees that they would be paid overtime compensation nor a particular hourly rate. Warehouse employees were routinely paid $80 to $120 in cash for weekend work regardless of the number of hours actually worked. Warehouse employees credibly testified that they worked the number of hours each week reflected on the plaintiff's summary exhibits. Most warehouse workers worked about the same number of hours each week, but with variations from one-fourth hour to several hours. Many rode to and from work together and worked from the time they arrived until the time they left. Employees who were drivers credibly testified they delivered to customers during many more hours than the records reflected, as shown in the plaintiff's summary

exhibits. Drivers testified credibly that other drivers who did not testify worked essentially the same number of hours as the witnesses, including many overtime hours for which no overtime was paid. Drivers continued to work through lunch breaks even though the company excluded break time from their payroll time.

20. Clerical employees credibly testified that all clerical employees worked many hours for which they were not compensated, and overtime for which they were not compensated at one and one-half times their rate, as reflected accurately on the plaintiff's summary exhibits.

21. The warehouse employees, driver employees, and clerical employees worked about the same number of hours each week from October 1993 to December 1994 as in the previous payroll periods before the company installed a computerized time clock.

22. Notwithstanding testimony of defendants' chief financial officer Andrew DeFrancesco and the expert witness Alan A. Schachter, the court finds that the company had no agreed plan to pay any employee in accordance with a lawful prepayment plan; no such plan was in writing or pre-approved.

23. Although the collective bargaining agreement between the defendant company and the union that represented its employees provided that employees would be paid at a regular hourly rate plus one and one-half times the rate for overtime hours in excess of 40 in a work week, the company ignored those provisions in the collective bargaining agreement and the union did not protest or seek to correct the record-keeping and overtime pay violations.

24. The employees Hladek, Krulish, and Cappizzi performed some supervisory and administrative duties, but their principal tasks were ordinary non-exempt work, and they spent most of their work time at non-exempt work. Those employees were not exempt from the requirements of overtime pay under the FLSA.

25. Only after January of 1995 did defendants begin paying employees for actual hours worked, based on the time clock installed during the ADP period. But even then, defendants allowed employees to work longer hours than the time clock registered.

26. The plaintiff's exhibits reflect as accurately as possible the actual time defendants' employees worked and the actual pay they received. The plaintiff properly ignored those Paychex payroll records and time clock records that did not square with the time employees said they actually worked. The plaintiff's summary exhibits provide reasonably accurate approximations of the hours employees worked in each payroll period and overtime pay unpaid, based on credible testimony of the employee witnesses. Plaintiff's witnesses properly used averaging to determine the amount defendants should have paid the employees, because the defendants failed in their duty to keep accurate records of hours worked and overtime hours for which premium pay was required.

27. Although the defendants' employees rarely complained that they were not paid in accordance with the FLSA, employees did not know or understand their rights under the FLSA. Until 1995 defendants did not provide employees sufficient information about hours worked and pay calculations from which they could determine the actual hours for which they were paid, compared to the

actual hours they worked. From May 8, 1992 until October 15, 1993, employees received their pay in cash in envelopes with no pay stubs or other payroll information. From October 15, 1993 through December 31, 1994, the employees did not receive accurate information about their arrival and departure times nor the working time deducted from their pay for lunch breaks or other reasons.

28. Defendants did not prove their defense that they had a so-called "Belo" prepayment plan with individual employees and groups of employees to prepay overtime compensation and stabilize employees' weekly pay. Defendants had no such written agreements or oral agreements with employees. Defendants did not prove the fluctuation in hours each employee worked was so great that a Belo plan was necessary. Defendants did not calculate employees' wages in accordance with such prepayment plans.

CONCLUSIONS OF LAW

1. Jurisdiction of this action is conferred upon the court by Sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201, *et seq.*) and 28 U.S.C. § § 1331 and 1345.

2. Defendants Harold Levinson Associates, Inc. and Edward Berro are employers within the meaning of section 3(d) of the Fair Labor Standards Act. Defendants constitute a covered enterprise within the meaning of section 3(s)(1)(A) of the Act.

3. The court overrules all objections made during trial on which ruling was reserved. Objections have been considered in determining the weight to be given evidence. Plaintiff's exhibits, including summaries based on employ-

ees' testimony and inadequate yet useful records kept by the defendant company, fairly represent and summarize the evidence about hours employees actually worked and amounts due for unpaid overtime compensation.

4. Defendants violated Section 7 of the Act by failing to pay employees for all hours worked over forty in a week at time and one-half the employee's regular hourly rate.

5. Defendants violated Section 11(c) of the Act by failing to accurately record all the hours employees actually worked either on a daily or weekly basis.

6. The court ruled in an Order dated August 7, 2000, after receiving briefs and oral arguments of counsel, that for purposes of computing proper overtime pay, each work week stands alone. Federal law does not ordinarily allow an employer to credit for past or future payroll time periods the money above minimum wags that employees are paid in a given time period. *See* 29 C.F.R. §§ 778.104 and 106. Section 778.104 provides in pertinent part:

> [p]ayment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.

7. Defendants' violations of the overtime and record-keeping provisions of the FLSA were willful under the Portal-to-Portal Act, 29 U.S.C. § 255, and therefore a three-year statute of limitations applies. After the 1991 investigation, defendants did not seek an opinion from the Wage and Hour Administrator or the Secretary of Labor concerning their pay practices that are here challenged. Before October of 1993, defendants defied the results of

the Secretary's investigation and continued to keep inaccurate and incomplete records. Defendants did not record the actual hours employees worked and did not compensate employees at the rate of time and one-half their regular hourly rate for each hour worked in excess of 40 each work week.

8. Defendants violated the law and their agreement with the Secretary by forcing employees to return to defendants the unpaid overtime compensation found due in the Secretary's 1991 investigation, unpaid wages in amounts defendants had agreed to pay. Defendants threatened employees with adverse employment consequences if employees refused to make the requested pay-backs. The defendants' records of payments were therefore false. This unconscionable conduct proves persuasively that defendants' violations of record-keeping and wage-payment requirements were intentional, willful violations.

9. During the period May 1992 to October 1993 defendants falsified their records of hours worked; during the period October 1993 to December 31, 1994, defendants maintained multiple sets of payroll records, some purporting to comply with the requirements of the Act. Defendants willfully disregarded their obligations to pay employees time and one-half their regular rate for hours worked over 40 each work week as required by their contract with the union and by the FLSA.

10. During the period May 1992 to October 1993, defendants knew that employees were working more hours than they were being paid for. Defendant Berro was present on a daily basis and observed employees working. Defendants scheduled and required the employees to work the number of hours they did, often more hours than scheduled. Defen-

dant Berro's deposition testimony to the contrary was evasive and not credible. Berro directed other management personnel to pay employees his way, knowing that his way violated the law. He rejected other officers' suggestions that he hire other employees and add another shift, believing his method of paying fixed salaries covering all hours worked for all employees gave him better control of the employees and the overall operation of the business.

11. During the period October 1993 to December 31, 1994, defendant Berro and management personnel working at his direction supervised the employees and knew they were working the number of overtime hours they actually worked. Defendants paid by schedules of work rather than actual hours worked even after they had the means to record and pay by actual hours after the installation of their time clock. During the period October 1993 to December 1994 defendants failed to pay time and one-half the regular rate for all hours worked over 40 each work week even after the installation of their time clock. During this period defendants conducted business with the actual knowledge that employees were working on a weekly basis more hours than they were being paid for, including overtime hours for which no overtime rate was paid. The defendants' record-keeping and overtime violations of the Act were willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-36 (1988); *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 141-42 (2d Cir.1999); *Reich v. Waldbaum, Inc.* 833 F.Supp. 1037, 1045 (S.D.N.Y.1993), *aff'd*, 52 F.3d 35, 39-41 (2d Cir.1995); *Brock v. Superior Care*, 840 F.2d 1054, 1062-64 (2d Cir.1988).

12. The court denies the plaintiff's request for injunctive relief because the plaintiff has not shown that the defen-

dants are still violating the FLSA or that injunctive relief is needed to prevent future violations of the FLSA.

13. Plaintiff has sustained the burden to prove the number of unrecorded hours all employees worked and the back wages due to those employees who did not testify. Testimony of the credible employees who did testify was fairly representative of testimony those not testifying would have presented. *See Anderson v. Mt. Clemens Pottery Co.*, 327 U.S. 680 (1946); *Reich v. Southern New England Tele. Corp.*, 892 F.Supp. 389, 405 (D.Conn.1995), *aff'd*, 121 F.3d 58 (2d Cir.1997); *Reich v. Waldbaum, Inc.*, 833 F.Supp. 1037, 1045 (S.D.N.Y.1993), *aff'd*, 52 F.3d 35, 39-41 (2d Cir.1995); *Dole v. DeSisto*, 929 F.2d 789, 792-93 (1st Cir.1991); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1297 (3d Cir.1991); *McLaughlin v. DialAmerica Marketing*, 716 F.Supp. 812, 824-25 (D.N.J.1989), *aff'd sub nom. Donovan v. DialAmerica Marketing*, 935 F.2d 1281 (3d Cir.1991), *cert. denied*, 502 U.S. 981 (1991).

14. Plaintiff established a *prima facie* case by a preponderance of all the evidence. Employee witnesses provided adequate evidence of the hours worked by drivers, clericals, and warehouse employees. Defendants failed credibly to rebut the testimony of these employees. Defendants' flawed records, together with employees' credible testimony, established overtime compensation was not paid for all hours employees worked over 40 in each work week. The plaintiff's proffered method of computation of unpaid overtime compensation, as set forth in Exhibits 3-9, is reasonable.

15. Employees Hladek, Cappizzi, and Krulish are salaried employees due overtime at additional half-time their regular hourly rate for all hours worked in excess of 40 each

week. Defendants did not prove they were exempt from the overtime provisions of the Act. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 391-92 (1960); *Donovan v. Carls Drug Co.*, 703 F.2d 650, 652 (2d Cir.1983); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 900-07 (3d Cir.1991); 29 C.F.R. § 541.

16. For the period May 2, 1992 until December 31, 1994, defendants must pay $487,584.58 in unpaid overtime compensation to 105 employees, as set forth in trial Exhibit 10, plus $16,500 due to Edward Krulish, for a total of $504,084.58 due those 106 employees.

17. After plaintiff credibly proved a *prima facie* case of FLSA violations, defendants did not meet their burden to rebut the plaintiff's proof of FLSA violations. Defendants did not prove their proffered, though unpleaded, defense based on prepayment and delayed payment of overtime compensation. Defendants did not prove they paid overtime compensation to employees for all hours worked in excess of 40 each week. *See Reich v. State of New York*, 3 F.3d 581 (2d Cir.1993).

18. Defendants did not plead or prove at trial the existence of a bona fide so-called "Belo" prepayment plan, nor did defendants prove any defense to the plaintiff's claims of record-keeping and overtime violations of the Act. A bona fide prepayment plan requires an explicit agreement between the employer and employee, employees regularly working hours less than 40 per week, and a weekly record of the running amount of prepaid overtime. In this case, there was no such agreement. Employees invariably worked in excess of forty hours per week, and the defendants kept no records of a running account of overtime purported to be prepaid. Defendants failed to carry their

burden to prove the existence of any valid prepayment plan.

19. Defendants failed to carry their burden to prove they had a reasonable and objective good faith basis for their violations of the overtime and record-keeping provisions of the FLSA, or that they had reasonable grounds for believing that their record-keeping and overtime practices were in compliance with the FLSA. *See Reich v. Southern New England Tele. Corp.,* 892 F.Supp. 389, 405 (D.Conn. 1995), *aff'd,* 121 F.3d 58 (2d Cir. 1997). Defendants were not just reckless, they were willful in intentionally violating record-keeping and overtime pay requirements of the FLSA.

20. Plaintiff is awarded $487,584.58 in liquidated damages, equal to the unpaid overtime compensation in the amounts listed on plaintiff's trial Exhibit 10. *See Herman v. RSR Sec. Servs. Ltd.,* 172 F.3d 132, 141-42 (2d Cir.1999); *Reich v. Southern New England Tele. Corp.,* 892 F.Supp. 389, 405 (D.Conn. 1995), *aff'd,* 121 F.3d 58 (2d Cir. 1997); *Brock v. Wilamosky,* 833 F.2d 11, 19-20 (2d Cir. 1982); *Martin v. Cooper Elec. Supply Co.,* 940 F.2d 896, 907-11 (3d Cir. 1991) (reh'g denied), *cert. denied,* _____ U.S. _____, 112 S.Ct. 1473 (1992).

21. On or before May 14, 2001, the defendants are ordered to deliver to plaintiff's counsel, or other designated representative of plaintiff, a certified check or equivalent payment in the total amount of $991,669.16 for distribution to the employees who were underpaid during periods here in question.

22. Neither the defendant Berro, nor the defendant company, nor any person on their behalf shall directly or indi-

rectly solicit or accept their return by any employee of any sums defendants pay to employees as damages, in accordance with this decision and the judgment to be entered by the clerk of court on April 30, 2001.

23. By noon on April 27, 2001, the parties shall submit to the clerk of court a joint proposed judgment to be entered by the clerk, or separate proposed judgments, from which the court and clerk of court will enter final judgment on April 30, 2001.

IT IS SO ORDERED.

2001 WL 34088698 (E.D.N.Y.)

Supreme Court, U.S.
FILED
AUG 31 2005
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No. 04-1602

In the Supreme Court of the United States

HAROLD LEVINSON ASSOCIATES, INC., ET AL.,
PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners' liability for unpaid overtime compensation may not be offset by a credit under Section 207(h)(2) of the Fair Labor Standards Act of 1938, 29 U.S.C. 207(h)(2), which authorizes such credit for "extra compensation" paid to employees that meet the qualifications set forth in 29 U.S.C. 207(e)(5)-(7), because petitioners failed to establish that they paid the qualifying extra compensation.

2. Whether the court of appeals was correct to uphold the district court's finding that the Secretary correctly calculated, as a matter of just and reasonable inference, the amount and extent of work that employees performed without being properly compensated.

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In the Supreme Court of the United States

No. 04-1602

HAROLD LEVINSON ASSOCIATES, INC., ET AL.,
PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is *reprinted in* 121 Fed. Appx. 918. The remand decision of the district court (Pet. App. 6a-14a) is unreported. The initial summary order of the court of appeals (Pet. App. 15a-22a) is not published in the *Federal Reporter* but is *reprinted in* 37 Fed. Appx. 19. The initial decision of the district court (Pet. App. 23a-39a) is not reported in the *Federal Supplement* but is *available at* 2001 WL 34088698.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2005. The petition for a writ of certiorari was filed on May 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, requires employers to pay overtime pay to covered employees at a rate not less than one and one-half times the employee's regular rate for any hours worked over 40 in a workweek. 29 U.S.C. 207(a)(1), 215(a)(2). For purposes of the FLSA, an employee's "regular rate" of pay is defined to include "all remuneration of employment paid to, or on behalf of, the employee," with certain enumerated exceptions. 29 U.S.C. 207(e). Those exceptions include, among others, certain extra compensation provided at a premium rate for hours worked over eight in a day; for work performed other than on regular workdays; or for work performed outside a workday or workweek established pursuant to an employment contract or collective bargaining agreement. 29 U.S.C. 207(e)(5), (6) and (7). An employer may credit extra compensation paid that falls under any of the exceptions listed in Section 207(e)(5)-(7) against overtime compensation payable to the employee under Section 207. 29 U.S.C. 207(h)(2).

The FLSA also requires covered employers to keep records of their employees' wages and hours. 29 C.F.R. 211(c); see 29 C.F.R. Pt. 516. The Secretary of Labor may sue to redress violations of the FLSA's minimum wage, overtime, and record-keeping provisions. See 29 U.S.C. 216(c), 217. In addition to recovering back pay for affected employees, the Secretary may recover an

equal amount in liquidated damages, unless the employer shows that he acted in good faith and had reasonable grounds for believing his actions did not violate the FLSA. 29 U.S.C. 216(c), 260.

2. Petitioners are a corporation and its president who are engaged in the wholesale distribution of cigarettes, tobacco, and candy and related activities. Pet. App. 24a. In 1990, a Labor Department investigator determined that petitioners had been violating the FLSA's record-keeping and overtime requirements. *Id.* at 28a. Petitioners agreed to make full restitution and provided the investigator with signed statements showing that employees had been paid, but later forced employees to return the money. *Ibid.* Between May 1992 and December 1994, the time period at issue in this case, petitioners made no genuine effort to maintain records that accurately reflected the lengthy hours that employees worked. *Ibid.* Between May 1992 and October 1993, when petitioners used Paychex, a payroll services company, to prepare its payment records, the payrolls were based on general schedules of hours that did not accurately reflect employees' working time. *Id.* at 27a, 29a. From October 1993 to December 1994, when petitioners used ADP, another payroll services company, to prepare their payment records, they created payroll hours for ADP that did not reflect time actually worked. *Id.* at 29a.

The Secretary of Labor brought an enforcement action against petitioners, alleging violations of the overtime and record-keeping provisions of the FLSA. Pet. App. 15a, 33a. After a bench trial, the district court found, *inter alia*, that petitioners had "continually, willfully evaded and violated known requirements of the FLSA." *Id.* at 28a. The court also found that petition-

ers had no lawful prepayment (or pay stabilization) agreement with its employees and that petitioners had ignored provisions in the collective bargaining agreement calling for an overtime rate of one and one-half times the regular rate for hours in excess of 40 hours in a workweek. *Id.* at 30a, 32a (factual findings), 37a-38a (legal conclusions).

Accepting the Secretary's calculations of actual time worked, actual pay received, and overtime pay due petitioners' employees, the court awarded $487,584.58 in back wages to 105 employees and an equal amount in liquidated damages (plus an additional $16,500 in back wages to one of the three employees for whom an exemption from overtime defense was claimed but not proved). Pet. App. 37a-39a.

3. On May 22, 2002, the court of appeals affirmed the majority of the district court's findings, but vacated and remanded the case solely for a "partial recalculation of damages." Pet. App. 17a. Finding that the damages award "unfairly penalizes the [petitioners]" by assuming that "in each week of the PCX [*i.e.*, Paychex] period each employee worked precisely the *average* number of hours worked [during the ADP period]," the court instructed recalculation to be "based on comparison of the total hours worked by each employee for the entire PCX period (computed by multiplying the imported ADP weekly average by total PCX-period weeks worked) against total hours compensated for the PCX period." *Id.* at 20a. In so doing, however, the court also rejected petitioners' argument that they were entitled to an offset for "overpayments" to their employees, recognizing that "this case does not involve payments that satisfy the requirements" of Section 207(h). *Id.* at 21a. It explained that its "decision to remand effectively gives the

[petitioners] the benefit of a credit for the PCX period, but does so not because as a matter of law [they] are entitled to credit one week's overpayment against another week's liability, but because of the lack of foundation for the [Secretary's] actual computations of weekly hours for the PCX period." *Id.* at 21a n.3.[1]

4. Following the remand order, the Secretary performed the directed recalculations, and a bench trial was held on August 4, 2003. Pet. App. 6a. The district court issued a decision on December 30, 2003, which upheld the Secretary's calculations and awarded $831,147.18 in actual and liquidated damages. *Id.* at 6a, 13a.[2] Based on the "plenary trial record" (including new evidence) developed in the event that the court of appeals might be persuaded to "reopen all issues," *id.* at 11a, the court reached the same findings of fact and conclusions of law it had adopted in its first decision "except for the method of calculating PCX damages for all but three employees." *Id.* at 13a.

5. The court of appeals affirmed. Pet. App. 1a-5a. The court initially noted that its earlier decision had rejected petitioners' arguments that (1) they were entitled, under Section 207(h), to a credit of $529,000

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[1] In effect, the court suggested that the use of the ADP departmental averages in the original calculations resulted in overstating the amount of owed overtime payments in weeks in which the recorded hours worked by an employee (who worked only during the Paychex period) were less than the departmental average. See Pet. App. 20a.

[2] The district court determined: "[The Secretary's] exhibits * * * accurately set forth the mathematical calculations called for by * * * the court of appeals decision. [The petitioners] have not presented any credible challenge to those calculations." Pet. App. 9a.

against their liability,[3] and (2) that the district court's formula for damages did "not yield a just and reasonable approximation of overtime hours worked." *Id.* at 3a. Nonetheless, the court considered the new evidence brought before the district court and concluded that petitioners' arguments were "wholly without merit." *Ibid.* Specifically, the court held that petitioners had failed to show that any alleged "overpayment" was made "for any of the purposes specified at 29 U.S.C. § 207(h)(2)." *Ibid.* Moreover, the court held that the district court acted reasonably in adopting the Secretary's recalculation of damages and in rejecting petitioners' "unreasonable and belatedly proferred alternative." *Id.* at 4a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this fact-bound case is unwarranted.

1. Petitioners' principal contention (Pet. 17-26) is that the circuits are divided over the question whether an employer's payment of extra compensation to its employees may "be credited across work weeks or work periods to offset liability for overtime wages" under 29 U.S.C. 207(h)(2). Pet. 16. No such question is presented in this case, however, because petitioners failed to establish that any alleged overpayment to their employees "was paid for any of the purposes specified at 29 U.S.C. § 207(h)(2)." Pet. App. 3a.[4]

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[3] According to petitioners, this sum is derived from their expert's calculation that petitioners had overpaid their employees $540,000, and underpaid them $11,000, for a net overpayment of $529,000. Pet. 13.

[4] Petitioners assert (Pet. 5 & n.1) that they paid $529,000 in extra compensation during the ADP period as part of an agreement to make

Section 207(h)(2) allows a credit only for compensation paid pursuant to 29 U.S.C. 207(e)(5), (6) and (7), *i.e.*, compensation paid at a premium rate for hours that exceed an eight-hour workday, for Saturday, Sunday, or holiday work, or for work outside a workday or workweek established by an employment contract or collective bargaining agreement. See 29 C.F.R. 778.201(c) ("No other types of remuneration for employment may be credited."). As the court of appeals explained, petitioners "fail[ed] to point to any evidence suggesting that § 207(e)(5), (6) or (7), as incorporated in § 207(h)(2), are applicable." Pet. App. 3a n.1. The court of appeals accordingly did not consider whether premium pay creditable pursuant to 29 U.S.C. 207(h)(2) may be credited

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up the difference between what the employees would have earned in overtime compensation before the period at issue in this case and what they would earn under the collective bargaining agreement governing that period. Even if true, there would be no claim that any extra compensation relating to either the Paychex or ADP periods was paid for the purposes specified in Section 207(e)(5)-(7). Instead, petitioners defended on the basis of 29 U.S.C. 207(f), which addresses prepayment plans for employees with unpredictable and irregular hours of work. Under Section 207(f), an employer may, under certain conditions and pursuant to a bona fide individual contract or a collective bargaining agreement, pay the employee a set amount each week despite varying hours worked by the employee, without incurring overtime-pay liabilities in the weeks in which the actual hours worked would normally entitle the employee to overtime pay. Those plans are known as "Belo" plans, following the decision that approved their use. See *Walling* v. *A.H. Belo Corp.*, 316 U.S. 624 (1942). The district court found that petitioners did not have a "Belo" prepayment plan. Pet. App. 37a-38a, a finding that the court of appeals affirmed, *id.* at 20a, and that petitioners no longer contest.